Supreme Court, U.S.
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No. _____

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In the Supreme Court of the United States

MICHAEL JEFFERSON,

Petitioner,

v.

CITY OF OMAHA POLICE DEPARTMENT; OFFICER PATRICK McCASLIN, Individually and in His Official Capacity; and THE CITY OF OMAHA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court below failed to properly consider Plaintiff was seized for the purposes of triggering Fourth Amendment protection?

II. Whether the test for the defense of qualified immunity is "arguable probable cause" and available to a defendant who lacks probable cause to arrest an individual?

III. Whether the court erred in finding that Defendant Sgt. McCaslin was not acting as a policy setter for the City of Omaha.

PARTIES TO THE PROCEEDING

Michael Jefferson, Petitioner

City of Omaha Police Department; Officer Patrick McCaslin, Individually and in His Official Capacity; and The City of Omaha, Respondents

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Michael Jefferson, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

CITATIONS OF OPINIONS AND ORDERS BELOW

A. THE DISTRICT COURT PROCEEDINGS

On September 29, 2000, Petitioner filed a Complaint and Request for Jury Trial in the United States District Court for the District of Nebraska. After Defendant filed a Motion to Dismiss Patrick McCaslin and the District Court subsequently granted, Petitioner was granted leave to substitute the City of Omaha as a defendant. Thereafter, on July 27, 2001, Petitioner filed an Amended Complaint and Request for Jury Trial to be heard. Defendant filed a Motion for Summary Judgment and the Court subsequently granted said motion on March 12, 2002. The District Court reasoned that although there was not probable cause to seize petitioner, McCaslin in his individual capacity was afforded qualified immunity because there was "arguable probable cause". Further, the District Court dismissed petitioner's Equal Protection Claim because the Court said petitioner failed to bring specific data showing petitioner was cited for a violation when similarly situated white people were not. Finally the District Court dismissed the actions against McCaslin in his official capacity finding as a matter of law McCaslin was not a policy maker of the city.

B. THE COURT OF APPEALS' DECISION

Petitioner timely appealed the dismissal of his Complaint to the United States Court of Appeals for the Eighth Circuit. Briefs were submitted April 18, 2003, and decided July 14,

2003. The Eighth Circuit Court of Appeals' decision was to uphold the grant of dismissal by the District Court and rehearing *En Banc* was denied. While the Court of Appeals was initially concerned whether petitioner was "seized" to trigger Fourth Amendment protection, they decided there was probable cause to "temporarily physically detain" petitioner and affirmed the dismissal.

BASIS FOR JURISDICTION

Summary judgment was granted to the Respondents, on July 10, 2001, at the District Court level. The Petitioner timely filed an appeal to the United States Court of Appeals for the Eighth Circuit. On July 14, 2003, the Eighth Circuit upheld the District Court's opinion dismissing the lawsuit. A Petition for *En Banc* was timely filed and was denied . The Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Jurisdiction was vested in the Eighth Circuit pursuant to 28 U.S.C. § 1291. The District Court's jurisdiction was founded upon 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, which are set forth in Appendix G at App. 34a – 37a.

42 U.S.C. § 1983
Neb. Rev. Stat. § 29-404.02
Omaha Municipal Code § 20-93

STATEMENT OF THE CASE

This case comes before the Court seeking reversal of Judge Bataillon's grant of qualified immunity to Defendant McCaslin in his individual capacity and summary judgment to

the City of Omaha and McCaslin in his official capacity. Michael Jefferson, a black Omaha World-Herald paper carrier, was arrested at his home for child enticement. His arrest was without warrant, without probable cause, and done without following the police investigatory procedures set out by the City of Omaha. Jefferson's arrest was in violation of his rights to Equal Protection on the basis of race contrary to the Fourteenth Amendment as well as the Fourth Amendment to the United States Constitution. Judge Bataillon found that although there was not probable cause for the arrest, McCaslin in his individual capacity was immune from suit because he had "arguable probable cause," and later found that the Defendant McCaslin was not acting in his official capacity by ordering a subordinate officer to make the arrest and thus granted Summary Judgment to the City of Omaha and Sergeant McCaslin.

STATEMENT OF FACTS

On October 25, 1999, Michael Jefferson was arrested at his home without a warrant. Jefferson is a black man who owns a red pickup truck. At the time, Jefferson was an independent contractor for the Omaha World-Herald. Mr. Jefferson was home cleaning his dishes when he saw a cruiser pull up to his home. Jefferson observed the cruiser pulling up and the officer walking to his house, so he met him at the door. Officer Gunter of the Omaha Police Department asked if Jefferson owned the vehicle in his driveway to which he admitted he did. He also asked if Jefferson delivered papers on the Eagle Run neighborhood. These questions were put to Jefferson on the porch while Jefferson was inside and Officer Gunter outside. Gunter never read Jefferson his Miranda rights. After the brief conversation on the porch, Gunter asked to come in and speak to him because the media might be following him. The media was later informed of the arrest

and it was printed in the paper. Jefferson, in response, invited him in and they gathered at the kitchen table. Officer Gunter then told Jefferson some children had said he tried to entice them into his vehicle. Gunter interviewed Jefferson, who denied the enticement charges. Gunter, throughout the time he was interviewing Jefferson, looked out the window and said the media might be following him.

Gunter called his supervisor Appellee Sergeant McCaslin from Jefferson's phone. During this phone conversation, Gunter told Sergeant McCaslin that Jefferson did not fit the profile. Nevertheless, Gunter was ordered by Sergeant McCaslin to arrest Jefferson under Omaha Municipal Code § 20-93 Enticement.

§ 20-93 provides:

> It shall be unlawful for any person to lure to any place or take away or attempt to lure to any place or attempt to take away to any place any child under 16 years of age with the intent to physically abuse or take indecent liberties with such child.

(Code 1980)

Two boys had told Officer Gunter that they were riding a bike and they were approached by a guy in a red pick-up truck who asked if they would like a ride home. The mother of one of the boys was the City of Omaha Personnel Director. The boys were not overly excited. One of the boys had the license plate written down, which the officer thought was a little strange. Mr Jefferson told Officer Gunter he was approached by two boys on Eagle Run West who said he looked like the guy who had been trying to get kids in their vehicle with candy.

The policy at the Omaha Police Department with regard to cases of child enticements, is that the children witnesses are always re-interviewed by a detective of the Omaha Police Department. The reason for that is to make sure they have their facts straight. According to Appellee McCaslin by state statute, children victims of sexual assaults are not interviewed by officers in uniform. McCaslin usually directs the officers to bring the children in and have them interviewed by a detective at project harmony. That was not done in this case supposedly because he had no one available because the detectives were working on other cases. Also, a detective usually re-interviews the suspects, but since supposedly no one was available, Sergeant McCaslin ordered Jefferson to be cited into Court. Normally the investigators would speak to the parents of the children alleging child enticement to get a feel for the children's education level, intelligence, and the like before a citation is issued. This was not done in this case. Sergeant McCaslin was ordered by his Lieutenant to go out after the arrest and re-interview the children although he claims he does not know why. All charges contrived by the defendants were dismissed by the Omaha Police Department on October 26, 1999, when the children admitted they made up the story. It is submitted that had Mr. Jefferson been a white member f the community, the policies and procedures normally used would have been applied. Omaha Police Crime Statistics show in the year 1999, the Omaha Police arrested 24,579 people, 10,791 of which were black or 44%. Douglas County Nebraska has a total population of 463,585 as of the 2000 census, 53,330 of which are black or 11.50%.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW GRANTING SUMMARY JUDGMENT.

The question before the district court is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see, e.g. Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

A. The Court of Appeals erred as a matter of law in deciding there was reasonable suspicion to make a physical detention.

The Court of Appeals, as an initial matter was not convinced that Mr. Jefferson has ever been "seized" for the purposes of triggering Fourth Amendment protection. The record does show that the encounter between Mr. Jefferson and the police officer began as a consensual one. Such an encounter does not become a "seizure" unless a "'reasonable person'" would not feel "'free to leave.'" *see e.g. INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). The Court of Appeals articulates that the only time Mr. Jefferson was seized was when the officer informed him that he would be issued as citation and during the time of issuing the citation. In *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring), it is unclear whether being detained for a citation is properly characterized as being "seized" when the state uses a "summons in lieu of arrest to secure his presence in court." *Id.* The Court of Appeals incorrectly asserts petitioner was not "seized." It is clear,

when the facts are viewed in the light most favorable to petitioner that Mr. Jefferson would not feel free to leave when Officer Gunter escorted petitioner out of his home, to the police cruiser, wrote him a ticket, fingerprinted him, and then contacted the media about the arrest. Furthermore, Officer Gunter's use of the fear that the media will be here shortly would compel a reasonable person so situated to follow the directions of the Officer and be forced to accompany him to the cruiser. Furthermore, Officer Gunter admitted that at that time Mr. Jefferson was not free to leave. Further, the City of Omaha Police Department released to the media that Mr. Jefferson had been cited for the crime. However, the Court of Appeals' decision did not rest the decision as to whether Mr. Jefferson was seized for purposes of Fourth Amendment protection.

The Court of Appeals decided that if there was a seizure, then it was more like a temporary physical detention that requires reasonable suspicion. *See e.g. Terry v. Ohio*, 392 U.S. 1, 16-19, 30 (1968), than a full-blown arrest requiring probable cause, *see, e.g., California v. Hodari D.*, 499 U.S. 621, 624-26 (1991). Further, that the facts in the present case are similar to those in *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1263-66 (8th Cir. 1996), *cert. denied*, 519 U.S. 867 (1996). However, the Court of Appeals errs as a matter of law when viewing the facts of the present case in the light most favorable to the petitioner. Probable cause exists if "the totality of the facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed...an offense" at the time of arrest. *Hannah v. City of Overland*, 795 F.2d 1385, 1389 (8th Cir. 1986)(quoting *United States v. Wallraff*, 705 F.2d 980, 990 (8th Cir. 1983)). Probability--not concrete proof--of criminal activity is the standard. *Smithson v. Aldrich*, 235 F.3d 1058, 1062 (8th Cir. 2000). "Probable cause is to be

determined upon the objective facts available to the officers at the time of the arrest." *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264.

The Court of Appeals' reasoning that there was reasonable suspicion to detain plaintiff flies in the face of stubborn fact. In the present case McCaslin contends that his decision to have Gunter issue citations to the plaintiff was based on reasonably trustworthy information that meets the reasonable suspicion standard. When the two children contacted Officer Gunter they related to him that Mr. Jefferson had asked the boys if he could put their bicycles in the back of his pick-up and give them a ride home. The two children specifically identified Mr. Jefferson as the man who had offered them a ride. The two children also told the officer that Mr. Jefferson was the man who delivered newspapers in their neighborhood, described Mr. Jefferson's truck, and gave the truck's license plate number. One of the boys' mother, who happens to be an administrator for the City of Omaha, told Officer Gunter that the boys were generally trustworthy. Officer Gunter verified the truck's registration and proceeded to Mr. Jefferson's home. During the initial consensual conversation, the plaintiff admitted to being in the boys' neighborhood and that while delivering papers that afternoon, he had encountered two white boys. This was at Eagle Run West, not Eagle Run East where the boys allege they met him. Further, Officer McCaslin was aware of a prior report of a black man in a red truck who had attempted to entice a child in the same area. However, Officer Gunter told Officer McCaslin that Mr. Jefferson did not fit the profile of the other black man in a red tuck who had attempted to entice a child in the same area. Offering to put a child's bike into the back of a pickup, even if true, does not rise to the level of attempting to take indecent liberties with a child. It merely conveys that Mr. Jefferson was offering to help the boys home. Had Mr.

Jefferson been a white individual, the arrest would not have occurred.

None of the exigent circumstances permitting warrantless misdemeanor arrest applied in Mr. Jefferson's circumstances. *See* Neb. Rev. Stat. § 29-404.02[1]. Further, the officer's investigation was not thorough enough to create sufficient reasonable suspicion for the citation. In *Brodnicki v. City of Omaha*, 75 F.3d at 1263. The Eighth Circuit determined that Omaha police officers, including defendant McCaslin, had probable cause to arrest a suspect for attempted kidnapping. Officers brought a child claiming near-abduction to the suspect's home for a show-up in his front yard, searched the suspect's car and found items similar to those the child had described, and questioned the suspect at police headquarters about his lack of an alibi. None of these procedures were used in the present case, and if they had been used, the officer's would have discovered they lacked even reasonable suspicion.

Even more suspect, the officers in the present case did not follow their own procedure for investigating enticement allegations. Officer McCaslin testified in depositions that a non-uniformed officer generally interviews children in

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[1] § 29-404.02 provides in pertinent part: Except as provided in section 42-928, a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed :(2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer;

enticement cases at a place called Project Harmony before a citation issues or an arrest is made. Officer McCaslin contends there were no deputies to interview the boys at Project Harmony or at police headquarters, and after hearing Officer Gunter's account he directed Officer Gunter to cite the plaintiff.

Given the totality of the circumstances existing at the time Officer Gunter cited Mr. Jefferson, the officers did not have sufficient reasonable suspicion to believe that Mr. Jefferson had violated the enticement ordinance. Defendant's did not have statutory authority to make a warrantless arrest, the boys were never interviewed according to the normal investigatory procedure of the Omaha Police Department, and the investigation certainly did not reach the level of that in *Brodnicki*. The decision to arrest Mr. Jefferson and cite him was premature.

B. The District Court erred as a matter of law in deciding that there was "arguable probable cause" is the standard for deciding qualified immunity.

The qualified immunity defense provides that "[a]n official performing discretionary functions will generally be immune from liability unless a reasonable person in his position would have known that his actions violated clearly established law." *Greiner v. City of Champlin*, 27 F.3d 1346, 1352 (8th Cir. 1994) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). When the parties agree to the relevant facts of the plaintiff's wrongful arrest claim, "'a court should always be able to determine as a matter of law whether or not the officer acted reasonably under settled law given the particular set of facts." *Pace v. City of Des Moines*, 201 F.3d 1050, 1056 (8th Cir. 2000). The actions by Officer McCaslin in directing the

citing of Mr. Jefferson defines the meaning of "unreasonable conduct" which deprives him of his immunity defense.

Determining whether McCaslin is entitled to a qualified immunity defense on a Fourth Amendment claim, the relevant inquiry is whether a reasonably person so situated would know he was violating a constitutional right. *Smithson v. Aldrich*, 235 F.3d 1058, 1062 (8th Cir. 2000). It is not arguable that a law enforcement officer must know that to make an arrest there must be probable cause without running afoul of the Fourth Amendment. The District Court's analysis as applied to the present case of "arguable probable cause" is erroneous when the facts are viewed in the light most favorable to Mr. Jefferson. The analysis provided in the present case by the District Court protects any government official who clearly violates the constitutional rights of citizens by forcing a complainant to prove a cause of action to the level of subjective decision making in any given situation. Such application unduly restricts the constitutional accountability of the government officials on the grounds of qualified immunity.

The test of "reasonable probable cause" arguably finds it's roots in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); however, the Eighth Circuit has taken the reasonableness test beyond the scope provided in *Harlow*. In *Harlow*, this Court articulated,

> We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known...If the law was clearly established, the immunity defense ordinarily should

> fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Id., at 818-19.

The test is to be an objective one. The Eighth Circuit has interpreted the law to say where there is a question of fact about whether the state actor could have reasonably believed he had probable cause, that the state actor is immune from suit. The Eighth Circuit has only provided a subjective test when looking for "arguable probable cause." The District Court rightly concluded that there was no probable cause thus there is a Fourth Amendment violation.

By improperly applying a subjective test the Eighth Circuit has provided a way for government entities to be forever exonerated from complete liability; they only mention the words "I think there was probable cause." Upon the mentioning of these words any government official is able to be shielded in qualified immunity. The present case is a perfect example of the injustice. Officer Gunter did not believe that Mr. Jefferson was the proper person to be cited for the enticement, he felt there was something wrong. After conveying this information to Sergeant McCaslin, Sergeant McCaslin still decided to have Mr. Jefferson cited for the offense even though the procedures to that point unmistakably part with that of the Omaha Police Department's normal protocol and that of the procedure used in *Brodnicki*. Consequently, the nearly unreachable standard of showing a

governmental official did not subjectively have "arguable probable cause" in this case has been surpassed.

C. The District Court erred as a matter of law in deciding McCaslin was not a policy maker for purposes of being sued in his individual capacity.

It is well-settled that qualified immunity is a defense available only to government employees sued in their individual capacities. See *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999). After finding there was arguable probable cause and thus qualified immunity, Mr. Jefferson pointed to the fact that Defendant McCaslin was sued in his official capacity as well and that Officer McCaslin had admitted that at all times he was an agent of the City of Omaha. On July 10, 2002, Mr. Jefferson's claim against McCaslin in his official capacity was dismissed.

The District Court dismissed the claim for two reasons, "[a] suit against a public employee in his or her official capacity is merely a suit against the public employer." *Id.* and articulated that if any claim against Officer McCaslin survives, it is a claim against the City. Second, the court articulated the reasoning that "Plaintiff faces his inability to allege an action performed under color of state law that resulted in a constitutional injury. *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998). The court reasoned that the plaintiff cannot establish that his misdemeanor citations for enticement were the result of an unconstitutional policy or widespread custom. McCaslin was given the delegated authority to decide whether or not to have citations issued to citizens such as Mr. Jefferson. Mr. Jefferson was cited at the direction of Officer McCaslin. Any opposition to this command would have been treated as insubordination. Thus, Officer McCaslin is directing the

active implementation of the policy to cite individuals. In the present case, Officer McCaslin used his delegated authority to deprive Mr. Jefferson from his constitutional guarantee of being free from unreasonable seizure.

The District Court found considerable weight in the fact that "Municipal liability may be imposed for a single decision by a municipal policymaker only if that person has final decision making authority in that area of the government's business." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986); *Angarita v. St. Louis Cnty.*, 981 F.2d 1537, 1546 (8th Cir. 1992); *Ware v. Jackson Cnty.*, 150 F.3d 873, 886-87 (8th Cir. 1998). Final policymaking authority was delegated to Officer McCaslin. For reasons of summary judgment the District Court should recognize that the Chief of Police for the City of Omaha cannot possibly have the ability to render a decision as to whether or not each and every citation be issued in the City of Omaha. However, this is the burden the District Court falsely requires before an officer of the Omaha Police Department will be able to be sued in their individual capacity for setting policy. McCaslin had the delegated authority within the Omaha Police Department as Sergeant with the Child Victim Sexual Assault Unit to have Mr. Jefferson cited. Officer McCaslin exercised his authority by having Mr. Jefferson cited without probable cause. The District Court states that this judgment was based on his experience as an officer. It is a slight of hand to declare an individual has been delegated the responsibility of deciding when to issue citations and on the other hand declare the individual has no policy making authority to decide whether a person is to be cited. Thus this case ought to be reversed.

D. The District Court erred as a matter of law in denying Plaintiff's relief whether Jefferson's arrest was motivated by his race contrary to equal protection.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, "which is essentially a direction that all persons similarly situated should be treated alike" *City of Cleburn v. Cleburn Living Ctr.*, 473 U.S. 432, 439. There is a clear issue in this case of whether the Plaintiff's race was the motivating factor that is the basis of the Defendant's conduct. Defendant McCaslin clearly strayed from his normal practices with respect to an investigation of this magnitude. "The Equal Protection Clause precludes selective enforcement of the law based on race." *Britton v. Rogers*, 431 F.2d 572, 577 (8th Cir. 1980). The practices of Defendant McCaslin and the police department resulted in unequal enforcement of a facially neutral investigation procedure. It follows that when the facts are viewed in the light most favorable to the petitioner that the lack of enforcement was motivated by the very purpose of discrimination. "To show discriminatory purpose, the claimant must show the official's decision to enforce the law was at least partially based on race." *United States v. Brown*, 9 F.3d 1374, 1375-76 (8th Cir. 1993).

Discrimination is generally proved with circumstantial evidence. In *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), the Court held:

> We think on the basis of this record, it was error to grant summary judgment. As the moving party, Respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these

> purposes the material it lodged must be viewed in the light most favorable to the opposing party. Respondent here did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while Petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that Petitioner not be served.

Adickes v. Kress & Co., 398 U.S. 144 (1970).

The significant gaps in the reasons given by the Defendants for their actions rendered summary judgment inappropriate. As such a fact finder could infer an improper motive. *Id.*

In the present case, Defendants did not follow state law with regard to warrantless arrests, their standard policies involving interviewing of minors, or suspects for an alleged violation of enticement. They simply focused on Jefferson, a black man, who had a lawful reason to be in the predominately white neighborhood.

The census of Douglas County shows only 11% of the population of the County is black. Contrasting that with the fact that 44% of the people arrested are black, one comes to the realization that race is a motivating factor in the arrest of an individual. Even had the Defendants had probable cause to arrest Jefferson, a contention the District Court found untrue, Jefferson can maintain this action for violation of his equal protection rights.

Even the determination of probable cause does not preclude a plaintiff from pursuing a claim that the state chose to prosecute him due to invidious discrimination. The courts

have long held that a selective enforcement claim may be available even where there is probable cause for prosecution. See e.g. *Wayte v. Untied States*, U.S. 598, 607 (1985); *Oyler v. Boles*, 368 U.S. 448, 455-56 (1962). The Sixth Circuit has held that the possibility of a discriminatory motive does not affect the inquiry into the objective reasonableness of an arrest for the purposes of the Fourth Amendment, *see United States v. Ferguson*, F.3d 385, 391 (6th Cir. 1993) (en banc), that case did nothing to question the long-established availability of a separate selective enforcement claim under the Equal Protection Clause. The Supreme court subsequently confirmed our interpretation fo the Fourth Amendment, and at the same time even more explicitly re-confirmed the availability of an equal protection claim despite the existence of probable cause:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

Whren v. United States, 116 S. Ct. 1769, 1774 (1996); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir.).

The court improperly concluded that no jury could find that petitioner was subjected to arrest on behalf of his race.

CONCLUSION

For the above foregoing reasons a the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-3085

[Filed August 21, 2003]

Michael Jefferson, Appellant,	)
v.	)
City of Omaha Police Department, et al. Appellees.	)

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

Order Entered at the Direction of the Court:

/s/_____
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-3085

[Filed July 14, 2003]

Michael Jefferson,	)
Appellant,	)
	)
v.	)
	)
City of Omaha Police Department;	)
Officer Patrick McCaslin, Individually	)
and in His Official Capacity;	)
City of Omaha, Nebraska,	)
Appellees.	)
	)

Appeal from the United States District Court
for the District of Nebraska

Before MORRIS SHEPPARD ARNOLD, BEAM, and MELLOY, Circuit Judges.

OPINION

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Michael Jefferson brought an action under 42 U.S.C. § 1983 against the City of Omaha, the Omaha Police Department, and Officer Patrick McCaslin. When the district court[1] granted summary judgment in favor of the defendants on all claims, Mr. Jefferson appealed. We affirm.

I.

"We review the district court's grant of summary judgment *de novo*." *Yarborough v. DeVilbiss Air Power, Inc.*, 321 F.3d 728, 730 (8th Cir. 2003). "Summary judgment is appropriate if, after viewing the evidence and all reasonable inferences from it in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact." *Id.*; *see* Fed. R. Civ. P. 56(c).

Mr. Jefferson was cited for two counts of enticement in violation of an Omaha ordinance based on the allegations of two young boys. One of these boys alleged that a black man driving a red truck had asked him and his friend if they wanted a ride home. The boy also told the officer that he believed that the man was a local newspaper carrier and, in addition, the boy gave the officer the license plate number of the red truck. The officer, who knew that there had recently been two reported incidents of a man in a red truck trying to

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[1] The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

entice children into his vehicle with candy, verified the details of this story with the other boy who was present at the time of the alleged enticement. He also received assurances from the first boy's mother that her son was generally trustworthy.

Satisfied as to the veracity of the boys' representations, the officer traced the license plate number to a red truck registered to Mr. Jefferson. Mr. Jefferson matched the description given by the boys in all relevant respects. When the officer went to Mr. Jefferson's residence and asked if he could speak with him, Mr. Jefferson assented and invited the officer into his home. The officer proceeded to tell Mr. Jefferson about the allegations made by the boys. Mr. Jefferson acknowledged that he had spoken with two boys that afternoon while delivering newspapers, but he denied having offered them a ride. The officer then called his supervisor, Officer McCaslin, who instructed him to cite Mr. Jefferson for two counts of enticement. Mr. Jefferson accompanied the officer to his police cruiser, the citations were issued, and the officer drove away. The next day, the children admitted that they had fabricated their story and all charges against Mr. Jefferson were immediately dropped. At no point was Mr. Jefferson taken into custody.

II.

We consider first Mr. Jefferson's claim that his fourth amendment rights were violated. Mr. Jefferson's contention is that the government arrested him without probable cause, thereby depriving him of his right to be free from unreasonable seizures. The well established rule "that a warrantless arrest without probable cause violates an individual's [fourth amendment] rights," *Hannah v. City of*

Overland, Mo., 795 F.2d 1385, 1389 (8th Cir. 1986), however, does not help Mr. Jefferson in this case.

As an initial matter, we are not convinced that Mr. Jefferson has even been "seized" for the purpose of triggering fourth-amendment protection. The record clearly shows that the encounter between Mr. Jefferson and the police officer began as a consensual one. Such an encounter does not become a "seizure" unless a "'reasonable person'" would not feel "'free to leave.'" *See INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) (opinion of Stewart, J.)). The only times at which Mr. Jefferson can even plausibly argue that he was seized, in our view, was when the officer informed him that he would be issued a citation and during the time that it took to issue the citation. But it is unclear that a mere citation can be properly characterized as a seizure. Although Justice Ginsburg has expressed the opinion that a person is "seized" when the state uses a "summons in lieu of arrest to secure his presence in court," *Albright v. Oliver*, 510 U.S. 266, 279, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) (Ginsburg, J., concurring), a majority of the court has not joined her in this view. And while our court has not taken up the matter, several of our sister circuits have been disinclined to expand fourth-amendment law in the direction that Justice Ginsburg suggested. For instance, the Sixth Circuit has held that a person was not seized by the issuance of a parking citation, *see DePiero v. City of Macedonia*, 180 F.3d 770, 789 (6th Cir. 1999), *cert. denied*, 528 U.S. 1105, 145 L. Ed. 2d 713, 120 S. Ct. 844 (2000), and the First Circuit has held that the commencement of criminal proceedings against a defendant coupled with the requirement that he appear several

times at the court's behest did not constitute a seizure, *see Nieves v. McSweeney,* 241 F.3d 46, 56 (1st Cir. 2001).

The disposition of this case, however, does not require us to resolve this issue. Even if there was a seizure here, that seizure was more like a temporary physical detention that requires reasonable suspicion, *see, e.g., Terry v. Ohio,* 392 U.S. 1, 16-19, 30, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), than a full-blown arrest requiring probable cause, *see, e.g., California v. Hodari D.,* 499 U.S. 621, 624-26, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991). Considering that the facts in the present case are virtually indistinguishable from those in *Brodnicki v. City of Omaha,* 75 F.3d 1261, 1263-66 (8th Cir. 1996), *cert. denied*, 519 U.S. 867, 136 L. Ed. 2d 119, 117 S. Ct. 179 (1996), where we found that there was probable cause to make an arrest, we do not hesitate to conclude that even if the issuance of citations to Mr. Jefferson was a seizure for purposes of the fourth amendment, it was certainly a reasonable one. Summary judgment was therefore properly granted as to Mr. Jefferson's fourth amendment claims.

III.

Mr. Jefferson also claims that the practices of the defendants resulted in the unequal enforcement of the Omaha ordinance that he was cited under, in violation of the fourteenth amendment. To succeed on a selective-prosecution claim, a plaintiff "must show both that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose." *United States v. Bell,* 86 F.3d 820, 823 (8th Cir. 1996), 519 U.S. 955 (1996). Mr. Jefferson has shown neither.

In order to establish a discriminatory effect, Mr. Jefferson must show that the law he was cited under was not enforced with the same vigor against persons of a different race. *See id.* But he does not offer any evidence as to the enforcement of the specific ordinance in this case. Instead, he offers generic evidence that 44% of the people arrested in his county are black although black people represent only 11% of the population. This evidence, standing alone, does not indicate a discriminatory effect in arrests generally, and it certainly does not indicate a discriminatory effect with respect to the specific ordinance at issue in this case.

Likewise, Mr. Jefferson has not shown that the defendants cited him based on an improper use of race. Mr. Jefferson was cited because he fit the description given by a witness to an alleged crime. Although that description included the suspect's race, it also included the suspect's gender, the color of his truck, the suspect's occupation, and the suspect's license plate number. In this context it was not improper for police officers to consider Mr. Jefferson's race in conjunction with the other aforementioned characteristics. We conclude that Mr. Jefferson has failed to produce evidence sufficient to create a genuine issue of material fact.

For the foregoing reasons, we affirm the order of the district court granting summary judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-3085

[Filed July 14, 2003]

Michael Jefferson,	)
Appellant,	)
	)
v.	)
	)
City of Omaha Police Department;	)
Officer Patrick McCaslin, Individually	)
and in His Official Capacity;	)
City of Omaha, Nebraska,	)
Appellees.	)
	)

Appeal from the United States District Court
for the District of Nebraska

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.
(5172-010199)

Order Entered in Accordance with Opinion:

/s/_____
Michael E. Jones
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

8:00CV515

[Filed July 10, 2002]

MICHAEL JEFFERSON,	)
Plaintiff,	)
	)
v.	)
	)
CITY OF OMAHA POLICE DEPARTMENT and OFFICER PATRICK McCASLIN, individually and in his official capacity,	)
Defendants.	)

MEMORANDUM AND ORDER

Before me are 1) the plaintiff's motion, Filing No. 69, for judgment on the pleadings; and 2) the defendants' motion, Filing No. 73, for summary judgment.[1] The parties submitted

[1] The defendants' supporting index of evidence was not filed separately but rather attached to the motion itself.

briefs in opposition on both motions, and the defendants filed an index of evidence, Filing No. 70, in opposition to the motion for judgment on the pleadings.

Despite the prior dispositive orders entered in this case, two constitutional claims arguably still remain: the plaintiff's claims against the City, brought pursuant to 42 U.S.C. § 1983, alleging that an unconstitutional policy or custom resulted in a violation of his Fourth Amendment and Equal Protection rights. Although no claims remain against defendant McCaslin in his individual capacity, *see* Filing Nos. 43 and 68, the plaintiff nevertheless now asks for judgment on the pleadings against McCaslin in his individual and official capacity. The defendants, in turn, ask the court to grant them summary judgment on any remaining claims. I have now reviewed the record, the parties' briefs, and the applicable law, and I conclude that the plaintiff's motion for judgment on the pleadings must be denied and the defendants' motion for summary judgment granted.

The plaintiff's motion for judgment on the pleadings is improper on several grounds. First, and most obvious: since my prior orders dismissed the plaintiff's claims against McCaslin, no claims remain on which to grant judgment. Second, assuming that some claim remains against McCaslin, the plaintiff's motion is improperly framed: since the plaintiff's motion presents matters outside the pleadings, the motion is not properly one for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), but instead one for summary judgment under Federal Rule of Civil Procedure 56. The defendants anticipated this procedural snare, as evidenced by their motion for summary judgment. Whether I analyze the matters before me as a motion for

judgment on the pleadings or as a motion for summary judgment, I conclude that the plaintiff's remaining claims must be dismissed as a matter of law. *See Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8th Cir. 1995) ("Where unresolved issues are primarily legal as opposed to factual, summary judgment is particularly appropriate.")

The plaintiff's position relies on the well-settled rule that qualified immunity is a defense available only to government employees sued in their individual capacities. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999) (in a section 1983 action alleging constitutional violations, owners of property erroneously seized by deputy sheriff under a valid writ of execution sued sheriff and deputies only in their official capacities, thus eliminating the availability of any qualified immunity defense). The plaintiff contends that his Fourth Amendment claims against McCaslin in his official capacity survived my order dismissing claims against McCaslin in his individual capacity on qualified immunity grounds. The plaintiff therefore insists that he is entitled to judgment on that Fourth Amendment claim. The plaintiff's approach is simply incorrect.

First, "[a] suit against a public employee in his or her official capacity is merely a suit against the public employer." *Id.* Thus, to the extent any claim against McCaslin survives, it is a claim against the City.

The second impediment the plaintiff faces is his inability to allege an action performed under color of state law that resulted in a constitutional injury. *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998). A local government cannot be held liable under section 1983 for

an injury inflicted solely by its employees on a theory of respondeat superior. *Id.*; *see Monell v. Department of Social Servs.*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Rather, a plaintiff seeking to impose such liability is required to identify either an official municipal policy or a widespread custom or practice that caused the plaintiff's injury. *Springdale Educ. Ass'n,* 133 F.3d at 651.

Here, the plaintiff cannot establish that his misdemeanor citations for enticement were the result of an unconstitutional official policy or widespread custom. As I held in my prior order, the problem with McCaslin's handling of the plaintiff's situation was his failure to follow the department's investigative protocol before citing the plaintiff for enticement. The plaintiff did not attack – nor could he, on the facts alleged – the investigative protocol itself as an unconstitutional policy or custom. McCaslin's decision to issue the citations in no way violated the Omaha Police Department written policy on warrantless arrests or the requirements of Nebraska law. *See* Filing No. 70, Carey Aff., Ex A; Neb. Rev. Stat. Ann. § 29-404.02 (Michie 1995). Nor did the plaintiff identify any custom implicated in McCaslin's decision to issue the citations.[2]

Moreover, even assuming that the plaintiff might be able to identify some unconstitutional policy or custom, the plaintiff cannot establish McCaslin's role as a municipal

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[2] As the defendants' summary judgment brief points out, the basis of the plaintiff's complaint is McCaslin's decision to issue the tickets for enticement rather than the department's policy or custom on publicly disseminating information about enticement allegations. Defendants' Brief at 16-17.

official with final policy making authority. Municipal liability may be imposed for a single decision by a municipal policymaker only if that person has final decision making authority in that area of the government's business. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 478, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986); *Angarita v. St. Louis Cnty.*, 981 F.2d 1537, 1546 (8th Cir. 1992); *Ware v. Jackson Cnty.*, 150 F.3d 873, 886-87 (8th Cir. 1998). But municipal liability under section 1983 "attaches only where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Schlmigen v. City of Rapid City,* 83 F. Supp. 2d 1061, 1066 (D.S.D. 2000) (citing *Pembaur,* 475 U.S. at 483). "Final policymaking authority is determined by whether an official has the authority to make official policy or custom regarding the action alleged to have caused the particular constitutional violation at issue." *Id.* at 1067 (citing *Angarita,* 981 F.2d at 1547).

Even if McCaslin had such authority within the Omaha Police Department as a sergeant with the Child Victim Sexual Assault Unit - which he did not[3] - that authority would not

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[3] Whether a particular official has final policy making authority is a question of state law. *Pembaur,* 475 U.S. at 483. Under Nebraska law, final policy making authority for the police department is vested in the chief of police. *See* Neb. Rev. Stat. Ann. § 14-602 (chief has "supervision and control of the police force," subject to orders of the superintendent of police). McCaslin had a few supervisory duties in his role as a sergeant with the Child Victim Sexual Assault Unit, but he did not make or determine policy for the unit or for the Omaha Police Department.

have been implicated in his decision to cite the plaintiff for enticement. McCaslin based his decision to alter the investigative protocol by citing the plaintiff before a detective had spoken with the boys on the strength of the information he received from Officer Gunter. No final policy making authority was implicated in this decision. Rather, McCaslin merely exercised his judgment as an experienced police officer. Consequently, the plaintiff's section 1983 claim based on the Fourth Amendment must fail.

The defendants also asks the court for summary judgment on the plaintiff's equal protection claim. I have already granted defendant McCaslin summary judgment on this claim in his individual capacity, *see* Filing No. 68 at 8-13, so the question here is whether my prior decision also exonerates the City (and thus McCaslin in his official capacity). While the Eighth Circuit rejects the notion that "there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability," the circuit also holds that municipal liability cannot be imposed "where there has been no violation of the plaintiff's constitutional rights as a result of action by the municipality's officials or employees." *Speer v. City of Wynne,* 276 F.3d 980, 985 (8th Cir. 2001) (noting that municipal liability might arise where no single official or employee's actions create a constitutional violation, but officials or employees' collective actions do). Since I have already ruled that McCaslin individually did not violate the plaintiff's equal protection rights, the City and McCaslin in his official capacity are thus entitled to summary judgment.

Accordingly,

IT IS ORDERED:

1. The plaintiff's motion, Filing No. 69, for judgment on the pleadings is denied;

2. The defendants' motion, Filing No. 73, for summary judgment on the plaintiff's remaining claims is granted;

3. By separate order, judgment shall be entered in favor of the defendants and against the plaintiff, with the defendants to be awarded reasonable attorney fees and costs.

DATED this 10 day of July, 2002.

BY THE COURT:

/s/_____
Joseph F. Bataillon
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

8:00CV515

[Filed March 12, 2002]

MICHAEL JEFFERSON,
Plaintiff,

v.

CITY OF OMAHA POLICE DEPARTMENT; and OFFICER PATRICK McCASLIN, individually and in his official capacity;
Defendants.

MEMORANDUM AND ORDER

I. Introduction

Before me are 1) defendant City of Omaha's motion, Filing No. 52, to dismiss the plaintiff's first cause of action in the amended complaint, Filing No. 44; and 2) defendant Patrick McCaslin's motion, Filing No. 34, for summary judgment on plaintiff's second and third causes of action in the amended complaint. Defendant McCaslin's motion for summary judgment is supported by an index of evidence,

Filing No. 35. The plaintiff submitted a brief opposing the motion for summary judgment and filed an index of evidence, Filing No. 42. After reviewing the record, the parties' briefs and indexes of evidence, and the applicable law, I conclude that 1) the defendant City of Omaha's motion to dismiss the plaintiff's first cause of action in the amended complaint is granted, and 2) defendant McCaslin's motion for summary judgment on the plaintiff's second and third causes of action in the amended complaint is granted.

II. Background

The parties do not dispute the key facts. The plaintiff, Michael Jefferson, is African-American. He seeks damages under federal and state law for an incident in which Patrick McCaslin, a sergeant with the City of Omaha Police Department (OPD), allegedly caused a subordinate officer to arrest Jefferson at his home without probable cause.

Jefferson drove a red pickup truck when delivering newspapers as an independent contractor for the Omaha World-Herald. Filing No. 44, Amended Complaint at 3, ¶¶ 11, 12 ("Amended Complaint"). On October 25, 1999, Jefferson delivered papers in the Eagle Run neighborhood in Omaha from around 4:15 p.m. until 5:00 p.m., then returned to his home around 5:30 p.m. *Id.* at 3, ¶¶ 13, 14.

Also on October 25, 1999, OPD Officer Reginald Gunter interviewed Matthew Frost, a nine-year-old boy living in the Eagle Run area, who alleged that a black man driving a red pick-up with license plate number 1-49109 had asked him and his friend Ted Elliott if they wanted a ride home. Frost told Gunter that the man was the area newspaper carrier. Gunter

verified the story with Ted Elliott. Filing No. 35, Gunter Aff. at 1-2, ¶¶ 3, 5. Gunter's check revealed that the plaintiff was the registered owner of the pick-up. *Id.* at 2, ¶ 6.

Gunter then went to the plaintiff's home. The plaintiff agreed to speak with Gunter and invited him inside. Gunter told the plaintiff that two boys from the Eagle Run neighborhood alleged that the plaintiff had tried to entice them into his truck. *Id.*, ¶ 7. The plaintiff told Gunter that he had spoken with two white boys that afternoon while delivering newspapers, but he denied having offered them a ride. *Id.* at 3. The plaintiff testified that the boys said he looked like the man they had heard about at school and on the news. Filing No. 42, Jefferson Dep., 33:14-35:25. Upon hearing this, Gunter assumed that the boys were referring to a man mentioned in a letter from the principal of the boys' school warning parents about reports of an unidentified black man driving a red pick-up truck who was attempting to lure children into his truck. Filing No. 35, Gunter Aff. at 3, ¶ 7; McCaslin Aff. at 2-3, ¶ 4, Ex. A.

Following his interview with the plaintiff, Gunter consulted with his superior, defendant McCaslin. At the time, McCaslin was a sergeant with the OPD Child Victim Sexual Abuse Unit. *Id.*, McCaslin Aff. at 1, ¶ 1. McCaslin instructed Gunter to cite the plaintiff on two counts of enticement pursuant to Omaha Municipal Code § 20-83. *Id.*, Gunter Aff. at 3, ¶ 7; McCaslin Aff. at 3, ¶ 5. The plaintiff followed Gunter to his cruiser, where Gunter fingerprinted the plaintiff and wrote out the citations. The plaintiff was never taken into physical custody or asked to come to police headquarters.

The next day, McCaslin himself interviewed the two boys and their parents. The boys assured McCaslin that they had told the truth about the incident. *Id.*, McCaslin Aff. at 3, ¶ 6. However, around 8:30 p.m., Ted Elliott's mother telephoned McCaslin to tell him that Ted had announced that he had fabricated the story. McCaslin talked to Ted, who admitted that the plaintiff had not offered the boys a ride in his truck. Ted said he told his story to Matthew Frost as a joke, and Matthew had played along. McCaslin then called Matthew Frost's mother and related what had happened. Matthew's father called McCaslin back a short time later to tell McCaslin that Matthew had admitted that he had not even seen the plaintiff the previous day. *Id.* at 4, ¶ 7.

McCaslin then immediately contacted OPD's Information Officer and instructed her to fax a release to the news media stating that the boys had recanted. When notified that the boys had recanted, McCaslin's commanding officer immediately voided the citations issued to the plaintiff. The citations had not been entered into OPD's database, so no record of them appears on the plaintiff's record. *Id.*, ¶ 8.

The plaintiff brought suit against the City and against McCaslin in both his individual and official capacity and as an OPD "policy maker." Amended Complaint at 2, ¶¶ 7,8. The plaintiff's complaint states that the action is filed pursuant to 42 U.S.C. § 1983, *id.* at 1, ¶ 2, and also identifies three other causes of action: a claim under the Nebraska Political Subdivisions Tort Claims Act, *id.* at 2-4, ¶¶ 10-24; a claim under the Fourth Amendment for a civil rights violation, *id.* at 4, ¶¶ 25-27; and a claim for a Fourteenth Amendment equal protection violation, *id.* at 5, ¶¶ 28-30. The plaintiff seeks back pay and benefits lost as a result of the defendants'

allegedly illegal acts, compensatory and punitive damages, and costs and attorney's fees. *Id.* at 5.

In their answers, McCaslin and the City affirmatively allege that 1) McCaslin himself neither arrested nor cited the plaintiff; 2) the citations were issued in good faith and with probable cause; 3) the charges against the defendant were canceled the next day when the two boys recanted; and 4) the second and third causes of action fail to state claims for relief. Filing No. 51, McCaslin's Answer at 2, ¶ 7; Filing No. 53, City's Answer at 2, ¶ 7. In addition, McCaslin affirmatively alleges that he acted in good faith and is entitled to qualified immunity. Filing No. 51, McCaslin's Answer at 2, ¶ 7.

In a prior order, I dismissed all claims against OPD and dismissed the Political Subdivisions Tort Claims Act cause of action against defendant McCaslin brought under the Nebraska law. See Filing No. 43. The City also now seeks dismissal of the plaintiff's state Tort Claims Act cause of action. McCaslin, for his part, now seeks summary judgment on all remaining claims against him.

III. Discussion

A. City's Motion to Dismiss

In my prior order, I dismissed the state Tort Claims Act cause of action against McCaslin. I found that Nebraska has not abrogated its immunity to a claim for false arrest, much less a claim for "negligent" false arrest. The plaintiff nevertheless reasserted the state Tort Claims Act in the amended complaint. For the reasons stated in my prior order, Filing No. 43, the plaintiff's first cause of action brought

under the Nebraska Political Subdivisions Tort Claims Act is dismissed as to all defendants.

B. McCaslin's Motion for Summary Judgment

On a motion for summary judgment, the question before the court is whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C); *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8th Cir. 1995). McCaslin raises three grounds for summary judgment.

1. Fourth Amendment. McCaslin contends that he is entitled to summary judgment on the plaintiff's second cause of action alleging a Fourth Amendment violation because probable cause existed to cite the plaintiff for violation of the enticement ordinance, Omaha, Neb., Muni. Code § 20-93 (1980).[1] In a section 1983 action, the question of probable cause is for the jury if the facts are disputed or subject to different inferences; the question is for the court, however, if the facts are undisputed or susceptible to only one reasonable inference. *Linn v. Garcia,* 531 F.2d 855, 861 (8th Cir. 1976).

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[1] The ordinance makes it "unlawful for any person to lure to any place or take away or attempt to lure to any place or attempt to take away to any place any child under 16 years of age with the intent to physically abuse or take indecent liberties with such child." Omaha, Neb., Muni. Code § 20-93 (1980).

Probable cause exists if "the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed . . . an offense" at the time of the arrest. *Hannah v. City of Overland,* 795 F.2d 1385, 1389 (8th Cir. 1986) (quoting *United States v. Wallraff,* 705 F.2d 980, 990 (8th Cir. 1983)). Probability - not concrete proof - of criminal activity is the standard. *Smithson v. Aldrich,* 235 F.3d 1058, 1062 (8th Cir. 2000). "Probable cause is to be determined upon the objective facts available to the officers at the time of the arrest." *Brodnicki v. City of Omaha,* 75 F.3d 1261, 1264 (8th Cir. 1996).

Here, McCaslin contends that his decision to have Gunter issue citations to the plaintiff was based on reasonably trustworthy information that meets the probable cause standard. The two children specifically identified the man who had offered them a ride as the man who delivered newspapers in their neighborhood, described the truck, and gave the truck's license plate number. The boys' mothers told Gunter that the boys were generally trustworthy. Gunter verified the truck's registration before he went to the plaintiff's home to discuss the children's allegations. During that initial consensual conversation, the plaintiff admitted to Gunter that he had been in the boys' neighborhood and that while delivering papers that afternoon, he had encountered two white boys who said he looked like the man who had been trying to lure children into his truck with candy. Further, McCaslin was aware of a prior report of a black man in a red truck who had attempted to entice a child in the same area. McCaslin contends under these circumstances, any reasonable police officer could have concluded that probable cause existed to cite the plaintiff under the enticement ordinance. He

and Gunter had no reason to suspect at the time of the citations that the boys had fabricated their story and no reason to discount the prior report of a similar attempted enticement. *See Brodnicki v. City of Omaha,* 75 F.3d at 1264-65 (finding, on similar facts, that "a reasonable police officer could conclude that probable cause existed to arrest" the section 1983 plaintiff).

The plaintiff counters that none of the exigent circumstances permitting a warrantless misdemeanor arrest applied in the plaintiff's situation.[2] See Neb. Rev. Stat. § 29-404.02. Further, the plaintiff contends that the officers' investigation was not thorough enough to create sufficient probable cause for the citations. *See, e.g.*, *Brodnicki v. City of Omaha,* 75 F.3d at 1263. In *Brodnicki*, the Eighth Circuit determined that Omaha police officers, including defendant McCaslin, had probable cause to arrest a suspect for attempted kidnapping. Officers brought a child claiming near-abduction to the suspect's home for a show-up in his front yard, searched the suspect's car and found items similar to those the child had described, and questioned the suspect at police headquarters about his lack of an alibi. The plaintiff complains that none of these procedures were used in his case, and that if they had been, officers would have discovered they lacked probable cause.

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[2] Under Nebraska law, an officer may arrest a person without a warrant on a misdemeanor offense if the person commits the offense in the officer's presence or if officer has reasonable cause to believe the person might flee, injure himself or others or damage property, or destroy or conceal evidence. Neb. Rev. Stat. § 29-404.02.

In the same vein, the plaintiff argues that had the officers followed their own procedure for investigating enticement allegations, they would have discovered the boys' falsehoods before issuing citations to the plaintiff. McCaslin testified in his deposition, for instance, that a non-uniformed officer generally interviews children in enticement cases at a place called Project Harmony before a citation issues or an arrest is made. Filing No. 42, Ex. 3, McCaslin Dep., 28:7-30:10. On October 25, however, McCaslin had no detectives available to interview the boys at Project Harmony or the plaintiff at police headquarters, so after hearing Gunter's account, he directed Gunter to cite the plaintiff. *Id.*, 30:11-34:5.

Since the parties' accounts of events do not differ in any material way, the probable cause issue is thus a legal issue for the court to resolve. *See Linn v. Garcia,* 531 F.2d at 861. I find that given the totality of the circumstances existing at the time Gunter cited the plaintiff, the officers did not have sufficient probable cause to believe that the plaintiff had violated the enticement ordinance.

It is true that the boys gave the correct license plate number of the plaintiff's truck and that they also specifically identified the driver of the truck as the man who delivered newspapers in their neighborhood. Further, the plaintiff admitted that he had encountered two boys that afternoon on his route. The boys, however, were never interviewed according to the regular investigative protocol for enticement cases.

An officer experienced in enticement cases should have interviewed the boys before citing the plaintiff. McCaslin's decision to cite the plaintiff was therefore premature. The

statute clearly provides that officers may issue citations only in limited circumstances, none of which were present here. The plaintiff was not a flight risk, nor had Gunter witnessed the alleged enticement. Thus, McCaslin and Gunter had insufficient probable cause to cite the plaintiff until an officer had interviewed the boys according to the investigative protocol.

However, before McCaslin can be held personally responsible for any Fourth Amendment violation, the court must determine whether qualified immunity exists. McCaslin's qualified immunity argument is discussed below.

2. Equal Protection. McCaslin contends that he is entitled to summary judgment on the plaintiff's equal protection claim in which the plaintiff alleges that the defendants' actions were based on the plaintiff's race. Amended Complaint at 5, ¶ 29. McCaslin argues that he did not decide to cite the plaintiff on the basis of the plaintiff's race, but because "a number of other characteristics of the described suspect all pointed to [the plaintiff] - with greater specificity than his race - and that identification of Plaintiff turned out to be correct." Defendants' Brief at 18.

The plaintiff nevertheless argues that the officers' failure to follow their usual investigative procedures "resulted in unequal enforcement" of those procedures and that the "lack of enforcement was motivated by the very purpose of discrimination." Plaintiff's Brief at 14. The plaintiff claims that because he is African-American, McCaslin failed to conduct an investigation as comprehensive as the investigation McCaslin had performed for the white suspect in *Brodnicki*. Further, the plaintiff cites census statistics showing that while

Douglas County is only 11% black, 44% of those arrested are black, leading the plaintiff to claim that "race may be a motivating factor in the arrest of an individual." *Id.*; Filing No. 42, Ex. 5.

The defendant is entitled to summary judgment on this claim because the plaintiff offers no evidence that McCaslin intentionally discriminated against him on the basis of his race when citing him for allegedly violating the enticement ordinance. A plaintiff claiming unequal enforcement of a facially neutral statute such as the Omaha ordinance must show

> both that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose. To establish discriminatory effect in a race case, the claimant must show that people of another race violated the law and the law was not enforced against them. To show discriminatory purpose, the claimant must show the official's decision to enforce the law was at least partially based on race.

United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996) (no selective enforcement where officers stopped black suspect for violating Iowa's bicycle headlamp statutes) (interior citations omitted). *See also United States v. Perry,* 152 F.3d 900, 903 (8th Cir. 1998) (criminal defendant's selective prosecution claim failed for "inadequate showing of discriminatory effect, coupled with his inability to produce any evidence of discriminatory purpose").

The plaintiff here fails to show that officers did not cite violators of a different race under the enticement ordinance. In the only comparable situation the plaintiff offers, *Brodnicki*, the suspect arrested for attempted kidnapping was white. Nor are the plaintiff's arrest statistics of any help in demonstrating race-based arrests, since they show only the total number of adult arrests by race alone, not by race and crime.

The plaintiff fares no better on the second prong of the *Bell* test, the requirement of showing that McCaslin's decision to cite him was motivated by the plaintiff's race. As McCaslin admits in his brief, the plaintiff's race did enter into his decision to cite the plaintiff because the two boys described the suspect as an African-American male who drove a red pick-up truck; the plaintiff is also an African-American male with a red pick-up truck. But McCaslin had considerable additional evidence that had nothing to do with the plaintiff's race. The plaintiff's truck bore the exact license plate number the boys provided. The suspect whom the boys described delivered newspapers in the boys' neighborhood, as did the plaintiff. Finally, the plaintiff himself admitted that he had encountered two neighborhood white boys that afternoon who had said he looked like the man they had heard about at school and on the news.

I find that McCaslin's decision to cite the plaintiff was not based on the plaintiff's race but on the objective facts developed during the investigation of the boys' report. Consequently, McCaslin's motion for summary judgment on the plaintiff's Fourteenth Amendment Equal Protection claim is granted.

3. Qualified Immunity. Finally, McCaslin contends that even if the court determines that he did not have probable cause to cite the plaintiff, he nevertheless is entitled to qualified immunity on the plaintiff's Fourth Amendment and Equal Protection claims.

The qualified immunity defense provides that "[a]n official performing discretionary functions will generally be immune from liability unless a reasonable person in his position would have known that his actions violated clearly established law." *Greiner v. City of Champlin,* 27 F.3d 1346, 1352 (8th Cir. 1994) (citing *Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)). When, as here, the parties agree on the relevant facts of the plaintiff's wrongful arrest claim, "a court should always be able to determine as a matter of law whether or not an officer is eligible for qualified immunity – that is, whether or not the officer acted reasonably under settled law given the particular set of facts." *Pace v. City of Des Moines,* 201 F.3d 1050, 1056 (8th Cir. 2000) (victim's statement she was "85-90 percent" sure that section 1983 claimant was her assailant found sufficiently credible to allow reasonable officer to conclude that probable cause existed; arresting officer therefore entitled to qualified immunity). The plaintiff argues that by not following the interview protocol for enticement cases before concluding that probable cause existed to cite the plaintiff, McCaslin engaged in "unreasonable conduct" that deprives him of a qualified immunity defense.

a. *Fourth Amendment Claim.* In determining whether McCaslin is entitled to a qualified immunity defense on a Fourth Amendment wrongful arrest claim, the relevant inquiry is whether McCaslin had probable cause to cite the

plaintiff for violation of the enticement ordinance. *Smithson v. Aldrich,* 235 F.3d 1058, 1062 (8th Cir. 2000). Under settled Fourth Amendment law, police officers have qualified immunity "if they arrest a suspect under the mistaken belief that they have probable cause to do so – provided that the mistake is objectively reasonable. Stated otherwise, 'The issue for immunity purposes is not probable cause in fact but arguable probable cause.'" *Id.* (quoting *Habiger v. City of Fargo,* 80 F.3d 289, 295 (8th Cir. 1996)) (interior citation omitted).

Although I have already concluded that McCaslin and Gunter did not have probable cause in fact, I find that they had at least "arguable" probable cause to conclude that the plaintiff had violated the enticement ordinance. The boys identified the correct license plate number of the plaintiff's truck, and they also identified the driver of the truck as the man who delivered newspapers in their neighborhood. The plaintiff corroborated the boys' statements when he admitted to Gunter that he had encountered two boys that afternoon on his route. Gunter and McCaslin were not required "to conduct a mini-trial" to weigh the boys' credibility or even to conduct a more detailed investigation before citing the plaintiff for the serious misdemeanor of enticement. *Morrison v. United States,* 491 F.2d 344, 346 (8th Cir. 1974). McCaslin should have followed normal investigative procedures before citing the plaintiff, but the standard for qualified immunity is arguable cause, not probable cause in fact and not negligent arrest. McCaslin is therefore entitled to qualified immunity on the plaintiff's wrongful arrest claim.

b. *Equal Protection Claim.* McCaslin is also entitled to qualified immunity on the plaintiff's equal protection claim.

The plaintiff contends that by selectively enforcing the enticement ordinance against him, McCaslin violated the plaintiff's clearly established right to equal protection. I have already concluded above that McCaslin did not selectively enforce the racially neutral enticement statute against the plaintiff. The plaintiff's race was only one factor among other more specific, racially-neutral factors that led McCaslin to conclude that he had probable cause to cite the plaintiff. As a consequence, McCaslin's motion for summary judgment on qualified immunity grounds is granted.

IT IS THEREFORE ORDERED:

1) The defendant City of Omaha's motion, Filing No. 52, to dismiss the plaintiff's first cause of action in the amended complaint, Filing No. 44, is granted; and

2) The defendant Patrick McCaslin's motion, Filing No. 34, for summary judgment on plaintiff's second and third causes of action in the amended complaint, Filing No. 44, is granted.

DATED this 12 day of March, 2002.

BY THE COURT:

/s/_____
Joseph F. Bataillon,
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

8:00CV515

[Filed July 10, 2002]

MICHAEL JEFFERSON, Plaintiff,	)
v.	)
CITY OF OMAHA POLICE DEPARTMENT; and OFFICER PATRICK McCASLIN, individually and in his official capacity; Defendants.	)

JUDGMENT

Pursuant to the Memorandum and Order entered on this case, Filing No. 76, judgment is entered in favor of the defendants and against the plaintiff. Defendants are hereby awarded their reasonable attorney fees and costs.

DATED this 10 day of July, 2002.

BY THE COURT:

/s/_____
Joseph F. Bataillon
United States District Judge

APPENDIX G

TITLE 42
THE PUBLIC HEALTH AND WELFARE
CHAPTER 21
CIVIL RIGHTS GENERALLY

42 U.S.C. § 1983 (2003)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REVISED STATUTES OF NEBRASKA CHAPTER 29. CRIMINAL PROCEDURE ARTICLE 4. WARRANT AND ARREST OF ACCUSED

R.R.S. Neb. § 29-404.02 (2003)

§ 29-404.02. Arrest without warrant; when

Except as provided in section 42-928, a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:

(1) A felony;

(2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer; or

(3) One or more of the following acts to one or more household members:

(a) Attempting to cause or intentionally, knowingly, or recklessly causing bodily injury with or without a deadly weapon; or

(b) Threatening another in a menacing manner.

For purposes of this section, household members shall include spouses or former spouses, children, persons who are presently residing together or who have resided together in the past, persons who have a child in common whether or not they have been married or have lived together at any time, and other persons related by consanguinity or affinity.

OMAHA MUNICIPAL CODE

§ 20-93

Sec. 20-93. Enticement.

It shall be unlawful for any person to lure to any place or take away or attempt to lure to any place or attempt to take away to any place any child under 16 years of age with the intent to physically abuse or take indecent liberties with such child.

(2)

No. 03-731

Supreme Court, U.S.
FILED
JAN 2 1 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL JEFFERSON,

Petitioner,

vs.

CITY OF OMAHA POLICE DEPARTMENT, OFFICER PATRICK McCASLIN, Individually and in His Official Capacity, and THE CITY OF OMAHA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari of the Plaintiff Michael Jefferson appears to raise the following three questions:

1. Did the Court of Appeals correctly find that the Defendants' issuance of a citation to Plaintiff complied with the Fourth Amendment?

2. Did the Defendant Police Officer Patrick McCaslin ("McCaslin") act as a municipal policymaker in his actions regarding the citation issued to Plaintiff; and if so, did his actions cause any constitutional violation?

3. Did the Court of Appeals properly affirm the dismissal of Plaintiff's equal protection claim, based on alleged selective prosecution based on race?

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Jefferson v. City of Omaha Police Department, No. 8:00CV515, 2002, U.S.Dist. Lexis 12565 (D.Neb. July 10, 2002)

Jefferson v. City of Omaha Police Department, 335 F.3d 804 (8th Cir. 2003)

Jefferson v. City of Omaha Police Department, No. 02-3085, 2003 U.S.App. Lexis 17249 (8th Cir. 2003)

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

> or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Contrary to Plaintiff's assertions at p. 2 and other places in his Petition, the relevant city ordinance is found at Omaha Municipal Code § 20-83, not 20-93. § 20-83 states as follows:

> It shall be unlawful for any person to coax or entice or attempt to coax or entice any child under 16 years of age into any vehicle unless licensed or privileged to do so.

NEB. REV. STAT. § 14-602 (Reissue 1997) states as follows:

> The chief of police shall have the supervision and control of the police force of the city, subject to the orders of the superintendent of police. All orders relating to the direction of the police force shall be given through the chief of police or, in his absence, the officer in charge of the police force.

Omaha Home Rule Charter § 3.11(1) states as follows:

> The public safety functions shall be performed by the following three departments: The Fire Department headed by the Fire Chief, the Police Department headed by the Police Chief, and the Communications Department headed by the Communications Chief. Each of these three department heads shall be in the classified service, notwithstanding any provision of the Home Rule Charter to the contrary.

STATEMENT OF CASE

The Plaintiff Michael Jefferson filed this action under 42 U.S.C. § 1983 against the City of Omaha, its Police Department, and Omaha Police Officer Patrick McCaslin (collectively the "Defendants"). Plaintiff alleges that a criminal citation issued to him by the Defendants violated the Fourth Amendment and was racially discriminatory in violation of the Equal Protection Clause. The Defendants answered, denying liability. The Defendant McCaslin alleged that he was protected by qualified immunity.

The facts of this case are set forth in the affidavits and depositions filed in the record.[1] This matter began when a boy reported to Omaha Police Officer Reginald Gunter that a man had tried to entice him and another boy into the man's vehicle. The boy described the suspect as a black male, driving a red pick-up truck. The boy stated that he recognized the suspect as the area's regular newspaper carrier. The boy had also taken note of the license plate of the red pick-up truck and reported that to Gunter. The boy's mother told Gunter that the boy was generally trustworthy. Gunter also spoke with the other boy whose story essentially matched the story told by the first boy. (App. pp. 166-169).

Gunter learned that the license plate number identified by the boy belonged to a red pick-up truck owned by the Plaintiff. Gunter went to the Plaintiff's house.

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[1] References to pages of the appendix before the Eighth Circuit Court of Appeals shall be denoted by "App. p. ___."

At the Plaintiff's house, Gunter told Plaintiff that there had been an allegation and asked if he could talk to him. Plaintiff invited Gunter to enter the house. Gunter entered and told Plaintiff of the allegations. Plaintiff confirmed that he was the regular newspaper carrier for the area and that he owned the red pick-up truck in question. Plaintiff stated that he did encounter two white male children that day on his route but denied that he had offered them a ride. (App. pp. 166-169).

Gunter then phoned the Defendant McCaslin, who was a sergeant with the Child Victim Sexual Abuse Unit. Gunter briefed McCaslin on the facts of the case. McCaslin advised Gunter to issue a ticket citation to Plaintiff for two counts of enticement under Omaha Municipal Code § 20-83.[2] (App. pp. 144-149, 166-169).

Gunter told Plaintiff that he would issue him a ticket citation. He asked Plaintiff to come out to his car because his ticket book was there. Plaintiff agreed, did so, and received the ticket in Gunter's car. Gunter did not handcuff Plaintiff, nor take him into physical custody, nor transport him to Central Police Headquarters, nor have him booked on charges. (App. pp. 166-169).

Prior to this incident, McCaslin had recently heard of two incidents in which a man in a red pick-up truck had allegedly attempted to pick up children in the Omaha

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[2] In Plaintiff's Brief at p. 2 and other places, Plaintiff continues to erroneously state that Omaha Municipal Code § 20-93 was the basis for the citation. The uncontradicted evidence in the record shows that § 20-83 was the basis for the citation. See App. pp. 146, 168, 187.

area, one of which occurred in this same area of the City. (App. p. 146).

The day after the citation, one of the boys' parents called McCaslin and told him that the boy had confessed to making up the incident. Later, the other boy's parent also confirmed the falsehood of the allegations. The Defendants immediately voided the Plaintiff's enticement citation. (App. pp. 147-148).

In a March 12, 2002, Order, the district court entered summary judgment in favor of McCaslin on both the Fourth Amendment and Equal Protection claims. In dismissing the latter claim, the district court found that "McCaslin's decision to cite the Plaintiff was not based on the Plaintiff's race but on the objective facts developed during the investigation of the boys' report." The court found that McCaslin was qualifiedly immune from the Fourth Amendment claim, because he had at least "arguable" probable cause to conclude that the Plaintiff violated the law. See Petition for Writ of Certiorari, pp. 17a-31a.

In a July 10, 2002, Order, the district court dismissed the remaining Fourth Amendment and Equal Protection claims against the City and against McCaslin "in his official capacity." In this regard, the district court found that the Plaintiff failed to show that the citation was the "result of an unconstitutional official policy or widespread custom." Petition, p. 13a.

On appeal, the Eighth Circuit Court of Appeals affirmed the summary judgments granted by the district court. The Court of Appeals questioned whether the issuance of the citation was a "seizure" entitled to Fourth Amendment protection. *Jefferson v. City of Omaha Police Department*, 335 F.3d 804, 806 (8th Cir. 2003). The court

said that even if it was, "it was certainly a reasonable one." *Id.* at 807. On the Equal Protection claim, the Court of Appeals noted that Plaintiff had failed to prove any discriminatory effect and any discriminatory purpose. *Id.*

ARGUMENT

I. THE COURT OF APPEALS PROPERLY FOUND THAT THE ISSUANCE OF A CRIMINAL CITATION TO PLAINTIFF DID NOT VIOLATE THE FOURTH AMENDMENT.

United States Supreme Court Rule 10 describes the considerations governing the grant of writs of certiorari. Plaintiff's Petition does not explicitly identify which of these considerations are applicable here. Rules 10(a) and (c) refer to Court of Appeals' decisions on "important" federal questions and other matters.

Most notably, Rule 10 adds that a petition for a writ of certiorari is "rarely granted" for "erroneous factual findings or the misapplication of a properly stated rule of law."

The latter is the situation here, regarding the Plaintiff's Fourth Amendment claim. At p. 8 of his Petition for Writ of Certiorari, Plaintiff argues that "[t]he Court of Appeals' reasoning that there was reasonable suspicion to detain Plaintiff flies in the face of stubborn fact." He alleges that the Court of Appeals erred "when viewing the facts of the present case in the light most favorable to the Petitioner." Petition, p. 7. In attacking the district court's view of the facts, Plaintiff argues that "[t]he District Court's analysis as applied to the present case of 'arguable probable cause' is erroneous when the facts are viewed in the light most favorable to Mr. Jefferson." Petition, p. 11.

These arguments sound very much like complaints of "erroneous factual findings" or the "misapplication" of law. Plaintiff's Petition merely reargues the facts.

However, Plaintiff's Petition does not contest the "reasonable suspicion" standard applied by the Eighth Circuit Court of Appeals. See *Terry v. Ohio*, 392 U.S. 1, 16-19, 30 (1968); *Knowles v. Iowa*, 525 U.S. 113 (1998) (citation situation is distinguished from custodial arrest situation, for purposes of permissibility and scope of attendant search). To the contrary, on several occasions in his Petition Plaintiff himself states that the "reasonable suspicion" standard is applicable, while arguing that the facts did not meet that standard. See Petition, pp. 7-10. Indeed, Plaintiff sums up his argument on this issue at p. 10 by stating that "the officers did not have sufficient reasonable suspicion to believe that Mr. Jefferson had violated the enticement ordinance."[3] Thus, Plaintiff's Petition for Writ of Certiorari asserts nothing more than "erroneous factual findings" or the "misapplication of a properly stated rule of law." Pursuant to Supreme Court Rule 10, certiorari is "rarely granted" under those circumstances. Accordingly, certiorari should not be granted on this issue.

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[3] Plaintiff also tries to contest the *district court's* use of an "arguable probable cause" standard, triggered by McCaslin's claim of qualified immunity. See Petition, pp. 10-13. However, the *Court of Appeals* opinion did not apply nor discuss any arguable probable cause standard, nor any issues of qualified immunity. Rather, the Court of Appeals applied the reasonable suspicion standard which, as noted above, Plaintiff apparently concurs with. Since Plaintiff attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1254 (see Petition, p. 2), it is the decision of the Court of Appeals, and not the district court, which is relevant here.

In the alternative, even if this Court were inclined to delve into the factual merits of the Fourth Amendment claim, there is ample evidence in the record to support the Court of Appeals' finding of reasonable suspicion. Two different victims/witnesses were separately interviewed by police officers and gave consistent stories on what happened. They positively identified the Plaintiff as the perpetrator. At his interview, Plaintiff himself admitted to being in the area at the relevant time and encountering two young boys. His only dispute was what he said to them.

As it turned out, this was not a case of misidentification. Plaintiff admitted to being in the area, and the boys correctly identified him. Rather, as the boys later confessed, the only falsehood was as to what Plaintiff said to them.

The Court of Appeals correctly noted that "the facts in the present case are virtually indistinguishable from those in *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1263-66 (8th Cir. 1996) cert. denied, 519 U.S. 867, 136 L.Ed.2d 119, 117 S.Ct. 179 (1996)." *Jefferson*, 335 F.3d at 807. In *Brodnicki*, the Court of Appeals found that similar enticement allegations by a nine-year-old child supported full probable cause for an arrest. Logically, the similar allegations in the present case easily meet the lower standard of reasonable suspicion.

Furthermore, this lower standard of reasonable suspicion should be lowered even further, given McCaslin's plea of qualified immunity. Qualified immunity shields a government official from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable

person would have known. *Wilson v. Layne*, 526 U.S. 603, 609 (1999), quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established. *Wilson*, 526 U.S. at 615. The qualified immunity test is separate and distinct from the test of whether there was an underlying constitutional violation. See *Saucier v. Katz*, 533 U.S. 194, 200-207 (2001). The "clearly established" test asks whether there are "any cases of controlling authority in [Plaintiff's] jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" or a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson*, 526 U.S. at 617.

Under the facts of the present case, McCaslin did not violate the law that was "clearly established" in the Eighth Circuit at the time. The clearly established law at that time was the factually indistinguishable *Brodnicki* case. In *Brodnicki*, the Eighth Circuit found full probable cause, under similar facts. Not only did *Brodnicki* clearly and effectively negate any supposed "clearly established right" of the plaintiff to be free from a citation under such facts – *Brodnicki* goes further and indicates that there was full probable cause (and, logically, reasonable suspicion) under such facts.

For all of the foregoing reasons, a writ of certiorari should not be granted on the Plaintiff's Fourth Amendment claim.

II. THE DEFENDANT McCASLIN WAS NOT A MUNICIPAL POLICYMAKER; AND IN ANY EVENT, HIS ACTIONS DID NOT CAUSE ANY CONSTITUTIONAL VIOLATION.

Plaintiff tries to resuscitate his Fourth Amendment claim by characterizing McCaslin as a policymaker. See Petition at p. 13. However, under applicable state and local law, McCaslin did not act as a municipal policymaker in having a citation issued to Plaintiff; and even if he was a policymaker, the Eighth Circuit Court of Appeals correctly ruled that there was no constitutional violation anyway.

Being stymied in his claim against McCaslin individually, Plaintiff presumably seeks to pursue liability under this "policymaker" theory, against the City or against McCaslin in his official capacity.[4]

A city cannot be liable under 42 U.S.C. § 1983 unless some city policy or custom is responsible for the deprivation of constitutional rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978). A plaintiff must not only identify the improper policy or custom; he must also "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997). "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident

[4] An official capacity suit represents only another way of pleading an action against an entity of which an officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-824 (1985). Only those municipal officials who have "final policymaking authority" may by their actions subject a city to such § 1983 liability. *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

An initial problem with Plaintiff's policymaker argument is that there still was no constitutional violation. Plaintiff's attempt to characterize McCaslin as a policymaker is irrelevant because there was no constitutional violation. As correctly noted in the Court of Appeals' opinion, the facts of the present case met the reasonable suspicion standard – a standard of law concurred with by the Plaintiff in his Petition, as noted above.

Proof of some allegedly unconstitutional policy or custom is irrelevant unless there has been an actual constitutional violation. In *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), this Court stated as follows:

> [None] of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

(Emphasis in original.) Thus, even if McCaslin was somehow "setting a policy" in having a citation issued to Plaintiff, without an underlying constitutional violation such a purported policy is "quite beside the point."

Furthermore, McCaslin simply was not a policymaker. Only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *St. Louis v. Praprotnik*, 485 U.S. at 123. Whether a particular official has "final policymaking authority" is a question of state law. *Id.* This question of state law is itself "a legal question to be resolved by the trial judge before the case is submitted to the jury." *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). Reviewing "state and local positive law," the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular violation. *Id.* See, e.g., *St. Louis v. Praprotnik,* 485 U.S. at 126, 130, (the U.S. Supreme Court looked to the St. Louis city charter to identify the final policymakers with respect to personnel administration, and held that "[s]imply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy.")

Similarly, McCaslin's decision to issue a criminal citation was not in any sense a "policy statement . . . approved by the supervising policymaker," or a "series of decisions" manifesting a "custom or usage" of which a supervisor must have been aware. *Id.* McCaslin's affidavit identifies the limited scope of his supervisory duties. (App pp. 144-145). McCaslin was not authorized to make or determine any policies or standard operating procedures for the Omaha Police Department nor for its Child Victim Unit. (App. p. 149). Any such proposed policy or standard operating procedure had to be approved by the chief of

police. *Id.* Omaha Police Chief Don Carey states the same thing in his affidavit. (App. pp. 188-189).

Police chiefs, sheriffs, and police superintendents are often found to be the final policymakers with respect to issues involving their departments. See, e.g., *Angarita v. St. Louis County*, 981 F.2d 1537 (8th Cir. 1992); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992). However, police officers making arrest decisions are not seen as "final policymakers." See, e.g., *Eversole v. Steele*, 59 F.3d 710, 716 (7th Cir. 1995) (arresting police detectives who "held position of authority" nevertheless were not policymakers; noted state statute giving police chief "exclusive control" over department); *Clark v. City of Lake St. Louis*, 735 F.Supp. 333, 335-336 (E.D. Mo. 1990) (even an arresting police chief held not to be the final policymaker); *Latuszkin v. City of Chicago*, 250 F.3rd 502 (7th Cir. 2001) (holding that police department superior officers and supervisors did not qualify as policymakers for the city); *McGautha v. Jackson County*, 36 F.3d 53, 56 (8th Cir. 1994) (holding that decision-making discretion cannot be equated with policymaking authority; supervisors were non-policymakers as defined by Missouri law).

While McCaslin was undoubtedly not a final policymaker for the City, the identity of the final policymaker is established by "state and local positive law" – Nebraska statutes and the Omaha Home Rule Charter. Nebraska state law makes the City's police chief the final policymaker with respect to his department. The police chief's authority is defined at NEB. REV. STAT. §§ 14-601 through 14-609. In particular, § 14-602 states:

> The chief of police shall have the supervision and control of the police force of the city, subject to the orders of the superintendent of police. All orders

> relating to the direction of the police force shall be given through the chief of police or, in his absence, the officer in charge of the police force.

This language, similar to that in the Indiana statute described in *Eversole*, above, effectively defines the police chief as the final policymaker for the Omaha Police Department, under state law. Similarly, Omaha Home Rule Charter § 3.11 (App. p. 221) identifies the police chief as the head of the police department. Plaintiff failed to prove that any deprivation of rights was caused by any policies set by any final policymaker.

In summary, the record does not support Plaintiff's characterization of McCaslin as a policymaker. Furthermore, even if McCaslin was somehow a policymaker, that status is irrelevant because there was no constitutional violation.

III. PLAINTIFF'S EQUAL PROTECTION CLAIM WAS PROPERLY DISMISSED BECAUSE THERE WAS NO EVIDENCE OF RACIAL DISCRIMINATION.

Plaintiff's Equal Protection claim is based on nothing more than conclusory allegations and generic arrest statistics that prove nothing on this issue.

To establish a claim for selective prosecution, a claimant must demonstrate that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. *Id.* To show discriminatory purpose, the claimant must show that race was a motivating factor in

the decision. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977).

The Court of Appeals' opinion in this case cited and applied these same rules. See *Jefferson*, 335 F.3d at 807. The Court of Appeals' opinion correctly cited the rule from *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996), cert. denied, 519 U.S. 955 (1996), which in turn correctly cited the aforesaid rule from *Armstrong* and other cases.

Significantly, Plaintiff's Petition for Writ of Certiorari does not appear to contest the law on the selective enforcement claim, as stated and applied by the Eighth Circuit panel. See Petition, pp. 15-17. Thus, there appear to be no grounds under Supreme Court Rule 10 for granting writ of certiorari on this claim. To the contrary, Plaintiff merely reargues the facts, pointing only to a variation from normal investigation procedures, and generic arrest statistics. Petition, pp. 15-16. Again, these asserted errors are nothing more than allegations of "erroneous factual findings or the misapplication of a properly stated rule of law" – matters for which certiorari should be "rarely granted," under Supreme Court Rule 10.

Even if this Court were to delve into the merits of this claim, the record is devoid of any evidence of discriminatory effect or purpose.

There is no evidence that race was a motivating factor in McCaslin's citation decision. The boys told police that the enticement was committed by the newspaper carrier for the area; Plaintiff was in fact that newspaper carrier. In any event, the boys' identification of Plaintiff turned out to be accurate. It was the rest of their story that was fabricated. In other words, Plaintiff was cited, not because

he was an African-American, but because a number of other characteristics of the described suspect all pointed to him – with greater specificity than his race – and that identification of Plaintiff turned out to be correct (App. pp. 148-149). Despite Plaintiff's speculative conjecture to the contrary, Plaintiff was not cited because of his race. He was cited because the boys specifically identified him, and lied about what he did.

Plaintiff argues that the Defendants varied in their investigative procedure. However, there is absolutely no evidence in the record that any such variance was connected in any way with the Plaintiff's race. To the contrary, the only evidence in the record on this issue is McCaslin's testimony that certain interview steps were not taken because he had no detectives available that day. (App. pp. 97, 100).

As was noted in *Armstrong*, supra, 517 U.S. at 465, a selective prosecution claimant must prove both discriminatory purpose and discriminatory effect. The lack of evidence of discriminatory purpose bars this claim.

In addition, this claim is also barred because Plaintiff has failed to offer any proof of discriminatory effect. There is no evidence in the record that, in the words of *Armstrong*, "similarly situated individuals of a different race were not prosecuted." *Id.* This is not a case of police seizing an African-American while disregarding some similarly situated white suspect. There is no evidence of any white persons committing enticement and not being cited for crimes.

Plaintiff's arrest statistics (App. p. 106) proved nothing on this issue. Without a racial breakdown of convictions, it cannot be said that the racial breakdown of

arrests is or is not appropriate. They are a statistical non sequitur. The Court of Appeals' opinion correctly characterizes this as "generic evidence," which "does not indicate a discriminatory effect" in arrests generally, nor with respect to the specific ordinance at issue. *Jefferson*, 335 F.3d at 807.

In summary, Plaintiff's Petition for review of the Equal Protection claim only reargues the facts and does not contest the legal standards applied. In any event, the facts do not support such claim.

CONCLUSION

Plaintiff's Petition for Writ of Certiorari complains of the Eighth Circuit Court of Appeals' handling of three issues:

1. Compliance with the "reasonable suspicion" standard under the Fourth Amendment;

2. The failure to find that McCaslin was a municipal "policymaker"; and

3. The rejection of the selective prosecution claim.[5]

In all three of these issues, Plaintiff merely reargues the facts or argues the misapplication of the law to the facts. Plaintiff does not contest the material legal standards

[5] As noted above, Plaintiff's complaint about the "arguable probable cause" standard used by the district court need not be addressed, since the Court of Appeals did not use that standard in its disposition of the Fourth Amendment claim.

applied by the Eighth Circuit Court of Appeals on these issues. Following the guidelines of Supreme Court Rule 10, the Petition for Writ of Certiorari should be denied. Furthermore, the Petition should be denied because Plaintiff's assigned errors are unsupported by the record and lack merit.

Respectfully submitted,

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